Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

AMERADA HESS CORPORATION, ET AL.,

Petitioners,

v

OWENS-CORNING FIBERGLASS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alabama Supreme Court's decision applying a settlement bar to Petitioners' maritime claims for contribution against a settling joint tortfeasor is contrary to controlling precedent from this Court which recognizes the "well-established maritime rule allowing contribution between joint tortfeasors"? Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974).

2. Whether the Alabama Supreme Court's rejection of Petitioners' maritime claims for indemnity against a third party defendant - asbestos manufacturer is contrary to controlling precedent from this Court and to precedent from the Fourth Circuit Court of Appeals?

3. Whether the reverse Erie application of the Supremacy Clause of the United States Constitution requires the Alabama Supreme Court to recognize as controlling

authority the Eleventh Circuit decision which rejects the application of a settlement bar to claims for indemnity or contribution against settling joint tortfeasors in admiralty actions?

LIST OF THE PARTIES

Amerada Hess Corporation

American Trading Transportation Company, Inc.

ARCO Marine, Inc.

Bermuth Lembcke Company, Inc.

Charles Kurz & Co.

Chevron U.S.A., Inc.

Chiquita Brands International, Inc.

Dole Fresh Fruit Co.

Isbrandtsen Company, Inc.

Keystone Shipping Company

Lykes Bros. Steamship Corp.

Marine Navigation Co.

Marine Transport Lines

Marine Transport Management Company, Inc.

National Bulk Carriers

Owens-Corning Fiberglass Corporation

PACO Tankers, Inc.

Red Hills Corporation

United Brands Company

Unocal

Warren Petroleum Company

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II. THE ALABAMA SUPREME COURT'S REJECTION OF PETITIONERS' INDEMNITY CLAIMS IS IN CONFLICT WITH THIS COURT'S DECISION IN RYAN STEVEDORING CO. V. PAN ATLANTIC STEAMSHIP CORP. AND THE FOURTH CIRCUIT COURT OF APPEAL'S DECISION IN VAUGHN V. FARRELL LINES, INC.

III. THE REVERSE ERIE APPLICATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THE ALABAMA SUPREME COURT TO RECOGNIZE AS CONTROLLING AUTHORITY THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION REJECTING A SETTLEMENT BAR RULE

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The decision from which Petitioners seek relief is officially reported at Amerada Hess Corporation, et al. v. Owens-Corning Fiberglass Corporation, ____ So.2d ____ (Ala. 1993) (case Nos. 1911251 and 1911252). That opinion is set out at Exhibit A of the Appendix. The Orders of the Mobile County Circuit Court granting summary judgment in favor of Respondent and against Petitioners are set out at Exhibit B of the Appendix.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment of the Alabama Supreme Court was rendered on August 27, 1993. An order denying a rehearing was entered on the same date. On November 16, 1993, an order was entered extending until December 23, 1993 the time within which to file this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, 28 U.S.C. § 1333 and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, art. VI, cl. 2 as set out in the Appendix, Exhibit D.

STATUTORY PROVISIONS INVOLVED

Sections 1257 and 1333 of title 28 of the United States Code as set out in the Appendix, Exhibit E.

STATEMENT OF THE CASE

This is an admiralty action. The Petitioners Amerada Hess Corporation, American Trading Transportation Company, Inc., Arco Marine, Inc., Bermuth Lembcke Co., Inc., Chevron U.S.A., Inc., Chiquita Brands International, Inc., formerly United Brands Co. and United Fruit Co., Isbrandtsen Co., Inc., Keystone Shipping Co., Chas. Curz & Co., Inc., Lykes Bros. Steamship Co., Inc., Marine Navigation Co., Marine Transport Lines, Marine Transport Management Co., Inc., National Bulk Carriers, Paco Tankers, Inc., Red Hills Corp., United Brands Co., Unocal and Warren Petroleum Co., are steamship companies whose maritime claims for indemnity or contribution against a settling joint tortfeasor were barred by the Alabama Supreme Court. The Petitioners urge that review is warranted because the Alabama Supreme Court's decision is in conflict with controlling

precedent from this Court and precedent from the Eleventh and Fourth Circuit Courts of Appeal. Petitioners also argue that review is appropriate since the Alabama Supreme Court's decision is contrary to the policy of promoting the uniform application of law, and the corollary policy of discouraging forum shopping, as expressed in Erie Railroad v. Tompkins and its progeny.

At trial, the Petitioners were sued under the Jones Act (46 U.S.C. § 688) and under the general maritime law. The plaintiffs allege that they contracted asbestosis while serving in the employ of the Petitioners. The Petitioners, in turn, made third party maritime claims seeking indemnity or contribution from asbestos manufacturer, Owens-Corning Fiberglass Corporation ("OCF"). OCF is the Respondent here.

The Petitioners based their contribution claims on Cooper Stevedoring Co. v. Kopke, 417

U.S. 106 (1974), United States v. Reliable Transfer Co., 421 U.S. 397 (1975) and other decisions which hold that contribution is the rule in the federal maritime law. Petitioners' indemnity claims were supported by this Court's opinion in Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956).

The issues of whether contribution and indemnity are available against settling tortfeasors were raised by Respondent during the pleadings stage by way of affirmative defense, motion to dismiss and motion for summary judgment. In its Motion for Summary Judgment, filed on November 2, 1990, Respondent stated:

> The claims of the Third-Party Plaintiffs and Cross-Claimants against the above-referenced Movant are for indemnity and/or contribution, and are due to be dismissed since this Movant has settled the claim of the Plaintiff.

The trial court granted Respondent's summary judgment motions (Appendix, Exhibit B), agreeing

that pro tanto settlements between the plaintiffs and Respondent, to which the Petitioners were not a party, barred Petitioners' third party claims against Respondent. The plaintiffs who settled with Respondent, (James L. Burnett (Case No. 1911251) and Bessie Shepherd (Case No. 1911252)), while not involved in this Petition, have claims against Petitioners which remain pending in the trial court.

Documentation of the settlements between plaintiffs and Respondent, filed in support of Respondent's summary judgment motions, was in the form of releases which evidenced Respondent's pro tanto settlement for $10,000.00 with plaintiff Burnett, and for $25,000.00 with plaintiff Shepherd. The settlements were negotiated in prior pending suits in Texas to which Petitioners were not a party. Consequently, the Petitioners neither consented

nor were otherwise a party to these settlements or releases.

Timely notices of appeal to the Alabama Supreme Court were filed on May 8, 1992. Since the issues in each appeal were identical, Petitioners filed motions to consolidate the appeals, by agreement, on July 9, 1992.

The summary judgments granted by the trial court were affirmed by the Alabama Supreme Court. With respect to indemnity, the court stated that "there is no right to indemnity based on the distinction between active and passive fault in maritime actions filed in Alabama state courts." (Appendix, Exhibit A, Decision of Alabama Supreme Court, pp. 10-11). On the issue of contribution from settling joint tortfeasors in maritime actions, the Alabama Supreme Court refused to follow the rule of the Eleventh Circuit which allows contribution. In affirming the ruling of the trial court, the

Alabama Supreme Court stated that the Eleventh Circuit's refusal "to recognize a settlement bar to contribution" is "inconsistent with the principles of maritime law." (Appendix, Exhibit A, Decision of the Alabama Supreme Court, pp. 17-18).

Finally, although agreeing with Petitioners' position that its decision would potentially lead to forum shopping, the Alabama Supreme Court refused to adopt the Eleventh Circuit opinion allowing contribution against settling joint tortfeasors, thereby conditioning the exercise of that federal right on whether or not suit is filed in federal court.

On appeal, the Petitioners raised the issues of the availability of indemnity and contribution claims in maritime actions. Petitioners assigned as error in their initial appellate brief the trial court's ruling that indemnity and contributions claims were not

available and the court's entry of summary judgments in favor of Respondent on that basis. In their Application for Rehearing, the Petitioners argued that the Alabama Supreme Court's decision frustrated the policy expressed in Erie Railroad v. Tompkins. Petitioners noted that the Alabama Supreme Court's failure to follow the Eleventh Circuit rule which rejects a settlement bar to claims for contribution results in the inconsistent application of federal law within one federal circuit.

ARGUMENT AND CITATION OF AUTHORITIES

I.

THE ALABAMA SUPREME COURT'S DECISION APPLYING A SETTLEMENT BAR TO PETITIONERS' MARITIME CLAIMS FOR CONTRIBUTION IS CONTRARY TO FEDERAL ADMIRALTY LAW AS EXPRESSED IN GOVERNING PRECEDENT FROM THIS COURT AND FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

The "well established maritime rule allow[s] contribution between joint tortfeasors." Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1976). The Alabama Supreme Court, however, rejected Petitioners' maritime claims for contribution and, in so doing, "decided a federal question in a way that conflicts with applicable decisions of this Court." See, Supreme Court Rule 10.

Presented for review in this case are the questions of whether a pro tanto settlement between an admiralty plaintiff and joint

tortfeasor bars indemnity or contribution claims of non-settling tortfeasors against the settling tortfeasor, and, if such claims are barred, whether the settling tortfeasor should remain in the litigation in order that non-settling tortfeasors be allowed to demonstrate for the jury at trial the percentage of fault attributable to the settling tortfeasor to have liability, if any, reduced in proportion to that percentage of fault.

As the Alabama Supreme Court noted in this case, this issue is of "grave consequence" to the voluminous asbestos related cases pending in Mobile, Alabama. (Appendix, Exhibit A, Decision of the Alabama Supreme Court, p. 10). The ultimate resolution of this case will also affect perhaps thousands of other similar maritime actions pending in the courts of New Orleans, New York, Cleveland and Philadelphia.

The question of the application of the "Settlement Bar Rule" to maritime claims for contribution warrants the attention of this Court since its resolution compels the balancing of the established federal maritime right to contribution and the policy of encouraging settlement. There is a split of decision between the federal circuit courts, and now between the state courts of Alabama and the very federal circuit in which they sit, or whether a settlement bar should be applied in these cases. Thus, the questions presented in this case are ripe for review by this Court.

Petitioners submitted briefs to the Alabama Supreme Court arguing that a settlement bar rule should not be applied to their maritime claims for contribution against settling defendants. This position is the first of three approaches set forth in Section 886A of the Restatement (Second) of Torts:

> The money paid extinguishes any claim that the [plaintiff] has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; **but the transaction does not effect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation.**

Emphasis added.

The Eleventh and Fourth Circuit Courts of Appeal follow this approach, allowing actions for contribution in favor of non-settling tortfeasors who are held liable for more than their pro rata share of fault. See, Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575, 1582 (11th Cir.) cert. denied, ____ U.S. ____, 113 S. Ct. 454 (1992) ("[A]n action for contribution against a settling tortfeasor may be maintained by a non-settling tortfeasor that has paid more than its share of the plaintiffs' damages based upon

the respective degrees of fault."); Vaughn v. Farrell Lines, Inc., 937 F.2d 953 (4th Cir. 1991) (expressly allowing a non-settling tortfeasor's cross-claims against a number of settling asbestos manufacturers who were found to be joint tortfeasors).

The remaining two options set forth in the Restatement do not provide for actions for contributions against settling joint tortfeasors. (Appendix, Exhibit C, Options II and III). The Eighth Circuit Court of Appeals, in Associated Electric Cooperative, Inc. v. Mid-America Transportation Co., 931 F.2d 1266 (8th Cir. 1991), adopted Option III, which provides that a judgment against a non-settling defendant is reduced by an amount equivalent to the settling defendant's pro rata share of fault, but prohibits claims for contribution or indemnity. Option III is also the option

adopted by the Alabama Supreme Court in this case.

If Contribution Claims Against Settling Tortfeasors are Extinguished, Settling Tortfeasors Should Remain in the Litigation to Ensure Accurate Apportionment of Fault.

Argument was also made by Petitioners that if the Alabama Supreme Court did bar their maritime contribution claims against the settling joint tortfeasor, i.e., Respondent, then the Respondent should not be dismissed from the litigation between the Petitioners and plaintiffs. Under United States v. Reliable Transfer Co., 421 U.S. 397 (1975), Petitioners should not be held liable for an amount greater than their pro rata share of a judgment. If Respondent is dismissed entirely from the action, thereby compromising Petitioners' ability to demonstrate for the jury the percentage of fault attributable to Respondent to have their liability, if any, reduced

proportionately, and assuming that Petitioners are barred from making independent contributions claims, there would be no mechanism remaining to ensure the result that is mandated by this Court's decision in Reliable Transfer Co., 421 U.S. at 411 (liability for damages in maritime actions "is to be allocated among the parties proportionately to the comparative degree of their fault . . . ."

Here, Petitioners note that this Court has accepted certiorari in two cases for the October 1993 term which present issues exceeding similar to those in the case sub judice. First, in McDermott, Inc. v. Clyde Iron, 979 F.2d 1068 (5th Cir. 1992) cert. granted, ___ U.S. ___ (1993), this Court will consider the question of the appropriate set-off to be made on a judgment against a non-settling tortfeasor on account of a settlement between the plaintiff and settling tortfeasor. Next, in Boca Grande Club, Inc. v.

Polackwich, 990 F.2d 606 (11th Cir.) cert. granted, ____ U.S. ____ (1993), this Court will entertain an appeal involving a summary judgment in favor of a settling tortfeasor which was vacated by the Eleventh Circuit Court of Appeals on the basis of the court's decision in Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575 (11th Cir.) cert. denied, ___ U.S. ____, 113 S. Ct. 484 (1992), which provides for contribution against settling tortfeasors.

Given this Court' determination to hear the appeals in McDermott and in Boca Grande Club, Inc., Petitioners submit that review in this case is warranted and would afford the Court a full and complete hearing, including on the question of whether the settling tortfeasor should remain in the litigation for purposes of determining proportionate fault if contribution is not to be preserved against the settling

tortfeasor. This issue will not be before the Court in either McDermott or Boca Grande Club, Inc.

There is a conflict among the circuit courts, and even between the Supreme Court of Alabama and the Eleventh Circuit, as to the approach which should govern the effects of pro tanto settlements. The Restatement itself refused to endorse any one option. ("The Institute leaves these issues to a caveat and takes no position.") Given the existence of this conflict, the wide ranging and profound effect on perhaps thousands of pending admiralty suits and the clear federal nature of the question, it is crucial that this Court review and resolve these most pressing issues.

II.

THE ALABAMA SUPREME COURT'S REJECTION OF PETITIONERS' INDEMNITY CLAIM IS IN CONFLICT WITH THIS COURT'S DECISION IN RYAN STEVEDORING CO. V. PAN ATLANTIC STEAMSHIP CORP. AND THE FOURTH CIRCUIT COURT OF APPEAL'S DECISION IN VAUGHN V. FARRELL LINES, INC.

Petitioners submit that the Alabama Supreme Court's rejection of their indemnity claims is contrary to the federal law of admiralty as established by this Court and by the Fourth Circuit. This Court has ruled that shipowners are entitled to full indemnity based on a third party defendant's warranty of workmanlike service. Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp. 350 U.S. 124 (1956). Indemnity in Ryan Stevedoring Co. is based on a contractual relationship between the parties, and may be premised on a defendant's supply of a defective product. A claim for indemnity under Ryan is distinct from a claim

for contribution. Ryan Stevedoring Co., 350 U.S. at 133.

Consequently, indemnity based on Ryan is particularly appropriate here, where Petitioners' indemnity claims against Respondent are based on Respondent's supplying asbestos products which caused the alleged injury. The Alabama Supreme Court's rejection of Petitioners' indemnity claims is therefore in conflict with governing precedent from this Court.

Additionally, review in this case is desirable since the decision of the Alabama Supreme Court is in direct conflict with the persuasive Fourth Circuit decision, Vaughn v. Farrell Lines, Inc. 937 F.2d 957 (4th Cir. 1991). The facts in Vaughn are exceedingly similar to those in this case. In Vaughn, the plaintiff sought damages against shipowners for the death of her husband caused by an

asbestos-related disease. Shipowners were allowed to recover on their claim for indemnity against the manufacturer of ship's boilers which contained asbestos insulation. The Fourth Circuit Court of Appeals found that the asbestos manufacturer was the active wrongdoer and should be made to bear the ultimate burden of loss. The court in Vaughn stated:

> This active-passive theory typically arises when the indemnitee has been held absolutely liable for the wrongful act of another as in an "admiralty context where a shipowner held liable on an unseaworthiness claim is awarded indemnity against a third party whose negligence caused the unsafe condition resulting in injury to a seaman." White, 662 F.2d at 249; see also Simpson Timber Co. v. Parks, 390 F.2d 343 (9th Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 130, 21 L. Ed. 2d 127 (1968). It was in almost this same context that the shipowners' right to indemnity arose in this case. In the indemnity trial, the

> district court found that the presence of asbestos insulation in the boilers manufactured by Foster Wheeler on shipowners' vessels rendered them unseaworthy; that such unseaworthiness caused the shipowners' [sic] to become liable to seaman Vaughn; and that the shipowners were not themselves guilty of negligence which either exacerbated the injuries or the likelihood thereof.

Vaughn, 937 F.2d at 357.

Therefore, where, as here, liability for a defective product is at issue, and the shipowner's liability to a seaman arises out of the mere presence of the defective product aboard the ship, the nature of liability is vicarious and thus indemnity is an appropriate remedy. The Vaughn decision recognizes that shipowners remain entitled to indemnity under admiralty law where they are only vicariously liable.

The conflict created by the Alabama Supreme Court's refusal to follow Ryan and/or

Vaughn provides a "special and important" reason for granting Petitioners' Writ of Certiorari in this case as set forth in Rule 10 of the Supreme Court Rules.

III.

THE REVERSE ERIE APPLICATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THE ALABAMA SUPREME COURT TO RECOGNIZE AS CONTROLLING AUTHORITY THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION REJECTING THE SETTLEMENT BAR RULE

The decision of the Alabama Supreme Court to reject the rule in the Eleventh Circuit which allows contribution against settling maritime joint tortfeasors establishes "a double system of conflicting laws in the same State." See, Guaranty Trust Co. v. York, 326 U.S. 99 (1944). Such a "double system", according to this Court, "is plainly hostile to the reign of law." Guaranty Trust Co., 326 U.S. at 112. The

"double system of conflicting laws" which the Court denounced in Guaranty Trust Co. operated when federal courts exercising diversity jurisdiction over state causes of action did not recognize as controlling the substantive law of the state in which it sat, but rather developed and applied a federal common law. That practice, of course, was invalidated in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Nevertheless, the Alabama Supreme Court's refusal in this admiralty, i.e., federal action to recognize as controlling the federal law of the circuit in which it sits, together with its adoption of a conflicting rule has installed in Alabama the mirror image of the "hostile" system which this Court banned in Erie.

Clearly, the Alabama Supreme Court's decision in this case frustrates the "nub" of the policy underlying Erie, which is "that for the same transaction the accident of a suit ...

in federal court instead of in a State court a block away should not lead to a substantially different result." Guaranty Trust Co., 326 U.S. at 109. This, however, is precisely the unfortunate circumstance in which **both settling and non-settling** tortfeasors find themselves in Alabama. If the decision of the Alabama Supreme Court in this case is left undisturbed, the respective liabilities of settling and non-settling maritime tortfeasors in Alabama will be determined by the plaintiff's forum choice, rather than by the federal rule set forth by the sitting federal circuit court. If the plaintiff files the primary suit in a federal court in Alabama, the non-settling tortfeasor's right to contribution is preserved against a third party settling tortfeasor under Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575 (11th (Cir.) cert. denied, ____ U.S. ____, 113 S. Ct. 484 (1992).

If, by chance, the primary suit is instead filed in state court in Alabama, the settling tortfeasor escapes since the Alabama Supreme Court has now extinguished the non-settling tortfeasor's right to contribution.

Thus, the "substantially different" result engendered by the Alabama Supreme Court's decision, which frustrates the dictates of Erie, affects the well established federal maritime right to contribution. While that right is preserved and enforced in the federal district courts in Alabama, it will now be ignored in significant respects by Alabama state courts which are bound by the decision of the Alabama Supreme Court.

Another ground on which this Court should accept certiorari in this case is that the Supremacy Clause of the United States Constitution (Appendix, Exhibit D) compels that federal law should be applied uniformly within a

federal circuit, whether the forum is a state court or federal district court. In Felder v. Casey, 487 U.S. 131 (1988), this Court made clear that a system of conflicting federal law in one state runs afoul of the Erie Doctrine and the Supremacy Clause.

> Just as federal courts are constitutionally obligated to apply state law to state claims, see, Erie, supra, at 78-79, 82 L. Ed. 1188, 58 S. Ct. 817, 11 Ohio Ops 246, 114 ALR 1487, so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected."

Felder, 487 U.S. at 151. The "substantial" federal right at stake here is the maritime right to contribution. (See, Kopke, 417 U.S. 106).

The Alabama Supreme Court's rejection of the Eleventh Circuit rule which preserves the

right to contribution is manifestly inconsistent with the goal of uniform application of federal law.

CONCLUSION

For the reasons set forth above, such reasons conforming to those in Supreme Court Rule 10, the Court should review this case on Writ of Certiorari.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION OF RESPONDENT, OWENS-CORNING FIBERGLAS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alabama Supreme Court's decision should be subjected to discretionary review on Writ of Certiorari in light of the following factors:

A. In the absence of a controlling opinion from the United States Supreme Court, the Alabama Supreme Court is not bound by decisions of lower federal courts;

B. The rule of law adopted by the Alabama Supreme Court advances both the goal of uniformity and the aims of admiralty law in relation to contribution from settling tortfeasors;

C. The decision of the Alabama Supreme Court is not in conflict

with the decision of the Eleventh Circuit Court of Appeals in Great Lakes in that the Eleventh Circuit's opinion was based on a singular set of circumstances and an apparent misapprehension of the law from the Fifth Circuit and from the Supreme Court in Edmonds v. Compagnie General Trans-Atlantique?

2. Whether the Petitioners can maintain non-contractual maritime claims for indemnity against third-party defendants?

3. Whether, if the Court decides that review should be granted, the Alabama Supreme Court's decision is a useful guide in balancing competing interests?

LIST OF PARTIES

Respondent agrees that the list of parties set out by Petitioners is complete and correct.

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OTHER AUTHORITIES

Commentary, The Conflicting Doctrines of Self and Leger; The Unsettling Uncertainty of Settlement In Admiralty, 41 Ala. L. Rev. 471 (1990) 23

Owen and Whitman, Fifteen Years Under Reliable Transfer, 22 J.Mar.L.&Com. 445 (1991) 23

Restatement (Second) of Torts § 886A Comment m 5-6

T. Shoenbaum, Admiralty and Maritime Law § 4-15, at 26 (Supp. 1992) . . . 17,27

CITATIONS TO OPINIONS BELOW

Respondent agrees with the citations set out by Petitioners as to the opinions and judgments delivered by the Alabama Supreme Court and the lower courts.

STATEMENT OF GROUNDS FOR JURISDICTION

The Respondent agrees with the Petitioners' statement of the grounds for jurisdiction. The Respondent agrees that jurisdiction of the court is invoked under 28 U.S.C. § 1257 or § 1333.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Similarly, Respondent agrees with the Petitioners' statement of involvement of the United States Constitution, Art. VI, Cl. 2 and the aforementioned United States Code sections.

STATEMENT OF THE CASE

Respondent agrees in general with the factual statements by Petitioners but denies all argumentative inserts. Specifically, Respondent states as follows:

Respondent denies that review is warranted because the Alabama Supreme Court's decision at issue here is in conflict with any controlling precedent from this Court. Despite Petitioners statement, decisions of the Fourth Circuit do not constitute precedent for the Supreme Court of Alabama. Also, in this case, as will be shown, no "precedent" from the Eleventh Circuit Court of Appeals is applicable to the Supreme Court of Alabama.

The Alabama Supreme Court's decision promotes the uniform application of admiralty law in those situations where the

right of contribution is circumscribed by rights of settling parties.

The Respondent would further note that the trial court granted Respondent summary judgment based on prior settlements between the plaintiffs and third party defendants. The pro-tanto releases filed in support of each summary judgment motion contained the following contractual indemnity language:

> In consideration for the payment of the aforesaid sum, the plaintiffs...agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim awarded by any person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the plaintiffs...arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to plaintiffs.

SUMMARY OF ARGUMENT

This case does not demonstrate those "special or important reasons" for the exercise of the Court's discretion in granting a review on Writ of Certiorari. The decision under consideration is a well-reasoned opinion which, considering the choices available to the Alabama Supreme Court, best advances the goal of uniformity and the balance of competing interests in admiralty law. To the extent that the admiralty law itself is not firmly settled in this area, as shown by the comments found after the Restatement (Second) of Torts, § 886A, Comment m, set out in the appendix of Petitioners, the Alabama Court's decision is no more in conflict with Federal Circuit decisions than all other decisions rendered by courts which have dealt with this issue.

The available options relating to settlement are limited. They stem from the three options set out in the Restatement (Second) of Torts § 886A referenced above. In an opinion of the Alabama Supreme Court rendered in Foster-Wheeler vs. Owens Illinois, 595 So.2d 439 (Ala. 1992), the court interpreted these options to be as follows:

> (I) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation...
>
> (II) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution.
>
> (III) The money paid extinguishes any

> claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor.

595 So.2d 442. (Emphasis in original.)

Faced with these three options, the Alabama Supreme Court, in a closely-reasoned opinion, chose Option Number III. The decision, sub judice, cannot unequivocally be said to be in conflict with the Eleventh Circuit's opinion in Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575, 1582 (11th Cir.) cert. denied, _____ U.S. _____, 113 S. Ct. 484 (1992).

In Great Lakes, the Eleventh Circuit was not writing "on a clean slate" as found by the Supreme Court of Alabama. Furthermore, the Great Lakes court misapprehended the effect of the controlling

precedent in Edmonds v. Compagnie Generale Trans-Atlantique, 443 U.S. 256, 99 S.Ct. 2753 (1979). Based on that misapprehension, the Eleventh Circuit limited the reach of Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) which should have constituted the court's true precedent.[1]

In addition, certiorari should not be granted because the foundations on which Petitioners claim the right to make their third-party claims are suspect. Petitioners have no right to make non-contractual third-party claims for indemnity and the claims for contribution must be circumscribed by the rights of the settling parties.

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[1] Initially, the Eleventh Circuit acknowledged it was bound by Leger because of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) adopting Fifth Circuit case law.

Therefore, in view of the history of the admiralty law in this area and the benefit of the Alabama Court's ruling in steadying this issue, this Court should deny the Shipowners' Petition for Writ of Certiorari to the Alabama Supreme Court.

ARGUMENT

I.

WHETHER THE ALABAMA SUPREME COURT'S DECISION SHOULD BE SUBJECTED TO DISCRETIONARY REVIEW ON WRIT OF CERTIORARI

The case sub judice is not one which presents special or important reasons for granting certiorari. It is simply a case involving a settling, alleged joint tortfeasor in admiralty. The Alabama Court, free to choose, chose one of a limited number of options. This occurs daily in admiralty cases involving multiple defendants. The decision should not be read to be in conflict with the decision of the Eleventh Circuit in Great Lakes because circumstances differed between these two cases.

The Alabama Court's decision involves an interpretation of the federal common law

in the area of admiralty and the Alabama Supreme Court's ruling fosters the emerging majority trend in that common law.

A. The Supreme Court has not ruled and the Alabama Supreme Court is not bound by the decisions of lower federal courts.

In Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989), the court summed up the state of the law concerning settlements in multi-defendant admiralty cases: "We sympathize with the District Court's difficulties in finding guidance from controlling authority on the settlement bar issue. There is none." Id at 903. The Miller court also stated: "The problem that...we face in this case has not been directly addressed by any Supreme Court case, since none of the Court's decisions have involved a settlement and release by one wrongdoer.

The parties to this appeal, and several lower federal courts, have recognized that the policies behind these presently well-established admiralty principles...do not clearly point to one result concerning the wisdom of a settlement bar." Id at 904.

Respondent would note that the Miller court, in reviewing the options chosen by other courts, did not find one prior to Great Lakes that had adopted Option I - allowing claims of contribution against settling parties. The Eleventh Circuit, alone, does not bar contribution claims against settling parties.

In Ballew v. State, 296 So.2d 206 (Ala. 1974), cert. denied 419 U.S. 1130, 95 S.Ct. 816 (1975), the Alabama Supreme Court held that decisions of federal courts other than the Supreme Court of the United States are

not binding upon a state court of last resort.

That view corresponds with the view of most commentators:

> (3) *Where there is conflicting federal authority on the issue presented.*
>
> The state courts should choose that precedent which they believe to be most likely to produce the result which the federal program is aimed to achieve. This calls for a thorough examination of the purposes of the federal program and an examination of all relevant federal precedent to determine the trend of federal law in this area. Note, The State Courts and the Federal Common Law, 27 Alb. L.Rev. 73,82 (1963).

In light of the absence of controlling precedent from the United States Supreme Court, the Alabama Supreme Court was free to follow that "precedent which they believe to be most likely to produce the result which the federal program is aimed to achieve." In

choosing Option III and enforcing a settlement bar, the Alabama Court did put itself with the majority of courts reviewing this issue.

B. The Rule of Law adopted by the Alabama Court advances both the goal of uniformity and the aims of the admiralty law.

The Alabama Supreme Court made clear that it thought the decision at issue was best to accomplish the purposes of admiralty law. The Court was aware of but chose to distinguish the Eleventh Circuit's ruling in Great Lakes. In the opinion, the Alabama Court set out at length the rationale and foundation of its decision, a rationale more compelling than that of Great Lakes.

The Court stated as follows:

"Because this Court's understanding of Option III and

Leger differs fundamentally from the construction offered by the Eleventh Circuit, we see no tension between Option III and maritime law such as was expressed in the Ebanks-Self-Great Lakes[2] trilogy. On the contrary, this approach appears to represent the most efficient method of accommodating the policies of federal and maritime law. As discussed above, the reduction in a plaintiff's claim by the pro

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[2] Ebanks v. Great Lakes Dredge and Dock Company, 688 F.2d 716 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983)

Self v. Great Lakes Dredge and Dock Company, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)

rata method of Option III is as likely to inure to the plaintiff's benefit as a pro-tanto reduction, which obtains pursuant to Options I and II, and it does not seem unreasonable to require the plaintiff to forgo that portion of his claim represented by the pro rata fault of the tort-feasor with which he voluntarily settled. A pro rata reduction in the plaintiff's total claim also prevents unfairness to the non-settling tort-feasors that can occur under Option II's pro-tanto reduction, which 'allows the plaintiff, in effect to 'repudiate' his bargain since he can be made whole out of the

pockets of the non-settling tortfeasors.' T. Schoenbaum, Admiralty and Maritime Law § 4-15, at 26 (Supp. 1992). Indeed, allocation of damages based on the settling tort-feasor's pro rata share of fault obviates the need for contribution to non-settling tort-feasors. Id.

The application of Option III, which, unlike Option I, recognizes the finality of a settlement, also accommodates the policy of the federal courts favoring settlements. See Fed. R. Civ. P. 68; Marek v. Chesny, 473 U.S. 1, 12-13 (1985) (Powell, J., concurring); Williams v. First Nat'l Bank, 216 U.S. 582, 595

(1910) ("Compromises of disputed claims are favored by the courts."); see also Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218, 222 (S.D.N.Y. 1991).

Moreover, allowing contribution from settling tort-feasors could subject plaintiffs to liability for damages and expenses recovered by non-settling defendants from settling defendants. For example, the settlement agreements involved in this case contained the following provision:

> 'In consideration for the payment of the aforesaid sum, the Plaintiffs ... agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim asserted by any

> person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the Plaintiffs or their representatives, heirs or assigns, arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to Plaintiffs.'
>
> (Emphasis added.) Based on this indemnity provision, OCF has stated its intention to pursue its rights and remedies against the plaintiffs in the event the shipowners' claims against it are successful."

Opinion pages 37-40, Appendix of Petitioners. (Emphasis added in part.)

Obviously, the right to contribution, which is not denied by any party hereto, is somewhat limited by competing rights of settling parties in two out of the three

possible options. Only Option I leaves contribution as an unfettered right in a settlement situation; and, after a thorough-going analysis, the Alabama Supreme Court chose not to adopt Option I because that was believed to frustrate rather than promote the goals of federal law.

C. The Alabama Supreme Court's decision should not be read to be in conflict with the Eleventh Circuit's decision in Great Lakes

The earliest case to discuss the issue of comparative fault where one or more defendants have settled was Leger v. Drilling Well Control, Inc., supra. There the Fifth Circuit, interpreting United States v. Reliable Transfer Co., 421 U.S. 397, 95 S.Ct. 1708 (1975) in conjunction with Cooper Stevedoring v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174 (1974),

decided that the nonsettling defendant who went to verdict was entitled to a reduction of the verdict amount based upon the settling tortfeasor's proportionate fault. This proportionate reduction was viewed as the only option available under the requirements of Reliable Transfer.

Four years after Reliable Transfer, the Supreme Court decided Edmonds v. Compagnie Generale Trans-Atlantique, supra. There the Court applied the traditional tort principles of joint and several liability. This appeared to mean that after these two cases, a plaintiff obtaining judgment against joint tortfeasors might choose to seek full satisfaction from either one regardless of comparative fault. The doctrine of contribution would allow the appropriate adjustment of damages to achieve

liability based on proportionate fault, however, there was no clear answer in the case of one or more defendants settling before verdict.

The Eleventh Circuit in Great Lakes was not writing on a clean slate because it carried the baggage of earlier rulings in the closely-related cases of Self and Ebanks, supra. The Eleventh Circuit started the trilogy by adopting Option II and effecting a settlement bar to contribution claims and ended by adopting Option I and proscribing a settlement bar. The reason appears to be that the Eleventh Circuit always believed that Option III, as applied in Leger, modified the principle of joint and several liability, as mandated in Edmonds, among nonsettling tortfeasors. This is not the case.

In Self, the Eleventh Circuit held that plaintiff was entitled to recover her entire damages regardless of the nonsettling defendant's percentage of fault with only a dollar for dollar credit being given for the settlement dollars paid by the settling defendant. This appeared to be the pro-tanto approach of Option II including a settlement bar to claims of contribution. The Eleventh Circuit in Great Lakes, subsequently reversed itself claiming that its holding in Self was dicta[3].

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[3] The dicta misled a number of commentators and courts: e.g., Miller v. Christopher, Supra, Associated Electric Co-Op v. Mid-America Transp., 931 F.2d 1266 (8th Cir. 1991), Owen and Whitman, Fifteen Years Under Reliable Transfer, 22 J.Mar.L.&Com. 445 (1991), Commentary, The Conflicting Doctrines of Self and Leger; The Unsettling Uncertainty of Settlement in Admiralty, 41 Ala. L. Rev. 471

The Great Lakes ruling misapprehended the effect of Edmonds on Leger when it concluded that Edmonds weakened Leger's effect as a precedent. As the Alabama Supreme Court said, "We might be inclined to agree with the approach thus adopted by the Eleventh Circuit if its analysis of Leger...[was] sound. We conclude, however, that the opposite is true." Opinion at pg. 35, Appendix of Petitioners.

The Alabama Supreme Court noted that the Eleventh Circuit felt itself bound by its earlier ruling that the Self "pro-tanto" approach had overruled Leger's "pro rata" approach and the Circuit Court believed it was limited to only Option I or II.

The Alabama Supreme Court stated:

(1990).

> The [Eleventh Circuit's] analysis proceeded upon the premise that Option III as applied in Leger abrogated or modified joint liability among nonsettling tort-feasors. Such an approach would relieve nonsettling tort-feasors not only of the liability represented by the pro rata share of settling tort-feasors, but also of liability represented by the pro rata shares of the nonsettling tort-feasors, thus requiring the plaintiff to bear the risk, for example, of a nonsettling tort-feasor's insolvency. Such an approach would, indeed, contravene the policy of maritime law...
>
> Nothing in the text of the Restatement, however, or, for that matter, Leger, requires this result. Significantly, the Fifth Circuit has recently declared expressly that Leger did not "eliminate the well established maritime rule of joint liability."...Option III, therefore, does not prevent a maritime plaintiff from recovering all his damages -- minus an amount represented by the settling tort-feasor's percentage of fault -- from any of the nonsettling tort-feasors. As among those tort-feasors, contribution provides the vehicle through which an equitable distribution of damages may be achieved.

Opinion, pages 35-37, Appendix of

Petitioners. (Emphasis in original, citations omitted.)

The Alabama Supreme Court had not constrained itself with a ruling similar to Self and was not obligated to continue paying homage to a faulty line of reasoning. If the Eleventh Circuit was freed of the peculiar limitations and misapprehensions in the trilogy of cases, the decision in Great Lakes might have been identical to the instant decision.

ARGUMENT

II

WHETHER THE PETITIONERS CAN MAINTAIN NON-CONTRACTUAL MARITIME CLAIMS FOR INDEMNITY AGAINST THIRD-PARTY DEFENDANTS

There have been three types of indemnity traditionally recognized in the law of admiralty: active-passive negligence, indemnity based on a breach of the implied duty of workmanlike performance as stated in Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), and contractual indemnity. It appears that only contractual indemnity has survived unquestioned following the adoption of the comparative fault rule in Reliable Transfer. See generally, T. Schoenbaum, Admiralty and Maritime Law §4-15. In Reliable Transfer, the court removed the last vestiges of an earlier doctrine called "divided damages"

which required damages stemming from an accident to be equally allocated between parties causing the accident regardless of the respective degrees of fault. The court looked to more modern principles of comparative negligence in abandoning the old rule.

The petitioners below argued only indemnity based on active-passive negligence. Any claim of indemnity based on Ryan was not presented or distinguished as petitioners attempt to do here. In fact, the Alabama Supreme Court framed petitioners' indemnity argument below as follows: "The Shipowners contend that OCF's conduct in supplying asbestos-containing products for shipboard use was 'actively' wrongful, while their fault consisted, they contend, only in failing to discover the danger of asbestos--

conduct that they insist was only 'passively' wrongful." Opinion at page 5, Appendix of Petitioners.

The Alabama Supreme Court went on to hold that an admiralty defendant's reliance on the active-passive fault doctrine was misplaced after Reliable Transfer. Id. at 7.

Apparently, the petitioners, having been rebuffed below, have reformulated their argument and now ask this Court to grant certiorari based on an argument not made to the Alabama Supreme Court. In other words, Petitioners are asking for a review of an issue that was not reviewed below.

The Petitioners cited Vaughn v. Farrell Lines, Inc., 937 F.2d 957 (4th Cir. 1991) below, but it was only to support their argument based on an "active-passive" indemnity. Indeed, Vaughn was decided on an

active-passive basis and is inapplicable to support some new theory of Ryan indemnity. As here, Vaughn below was the Petitioners' sole authority for indemnity claims, but it should be noted that Vaughn does not discuss Reliable Transfer or any cases coming after Reliable Transfer establishing a proportional fault or comparative negligence scheme. It only discusses indemnification and the cases it cites, given the changes in admiralty law, are not compelling. If anything, Vaughn stands as a derelict in the harbor of admiralty law, posing danger for the unwary in the Fourth Circuit. Vaughn was never shown to be applicable in the Alabama Supreme Court and, in fact, that court expressly rejected its holding.

ARGUMENT

III

IF THIS COURT ELECTS TO REVIEW, THE ALABAMA SUPREME COURT OPINION IS A USEFUL GUIDELINE FOR BALANCING COMPETING INTERESTS

Should this Honorable Court decide on review by Writ of Certiorari to the Alabama Supreme Court, the opinion of that court should be carefully considered. The Alabama Supreme Court went to great lengths in deciding on an appropriate mechanism for handling claims of contribution in the situation where one or more alleged joint tortfeasors settle with the plaintiff.

The Alabama Court considered the issues of fairness to the parties to the underlying litigation as well as the aims and expectations of the admiralty law. Although some differences did exist between the circuits on this issue, none were glaring

until the Eleventh Circuit's ruling in Great Lakes.

The Alabama Supreme Court's decision puts it in the majority of courts which have considered this issue. Its insights on the Eleventh Circuit's rulings in the trilogy of cases ending in Great Lakes are most valuable in showing that those decisions are based on faulty analysis and, hence, should be of little precedential worth.

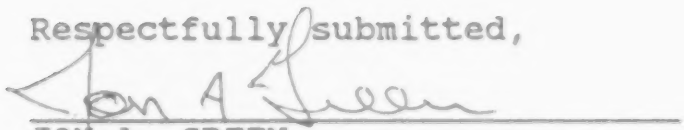
The Alabama Court's reasoning concerning the best option to choose should also be of use to the court because it leaves intact the foundation stones of right to contribution between nonsettling tortfeasors and joint and several liability as among nonsettling tortfeasors.

CONCLUSION

For the reasons set forth above, Petitioners, in the circumstances of this case, have failed to show a clear conflict with the circuits or that special or important reasons exist for review of this case on Writ of Certiorari to the Alabama Supreme Court.

WHEREFORE, the Respondent, Owens-Corning Fiberglas, Inc., respectfully prays that the Petition for Writ of Certiorari to the Alabama Supreme Court be denied.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(3)

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

AMERADA HESS CORPORATION, et al.
Petitioners,
v.
OWENS-CORNING FIBERGLASS CORPORATION
Respondent.

APPENDIX OF PETITIONERS

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60 pp

EXHIBIT A

OPINION OF

THE SUPREME COURT OF ALABAMA

Amerada Hess Corporation, et al.

v.

Owens-Corning Fiberglass Corporation

American Trading Transportation Company, Inc., et al.

v.

Owens-Corning Fiberglass Corporation

Appeals from Mobile Circuit Court

(CV-89-643 and CV-90-449)

SUPREME COURT OF ALABAMA

OCTOBER TERM 1992-93

1911251 and 1911252

Amerada Hess Corporation, et al.

v.

Owens-Corning Fiberglass Corporation

American Trading Transportation Company, Inc., et al

v.

Owens-Corning Fiberglass Corporation

Appeals from Mobile Circuit Court

(CV-89-643 and CV-90-449)

ADAMS, JUSTICE.

Amerada Hess Corporation; American Trading Transportation Company, Inc.; ARCO Marine, Inc.; Bermuth Lembcke Company, Inc.; Chevron U.S.A., Inc.; Chiquita Brands International, Inc.; Isbrandtsen Company, Inc.; Keystone Shipping Company; Marine Transport Lines; Marine Transport Management Company, Inc.; National Bulk Carriers; PACO Tankers, Inc.; Red Hills Corporation; United Brands Company; Unocal; and Warren Petroleum Company (all hereinafter referred to as the "shipowners") are defendants and third-party plaintiffs in an action by former seamen alleging asbestos injuries. The shipowners appeal from summary judgments in favor of Owens-Corning Fiberglass Corporation ("OCF") on their third-party claims seeking indemnity or contribution from OCF, whose asbestos products, it is alleged, were aboard the shipowners' vessels and injured the seamen. We affirm.

This case represents another installment in the ongoing maritime asbestos litigation addressed previously by this Court in Foster Wheeler USA Corp. v. Owens-Illinois, Inc., 595 So. 2d 439 (Ala. 1992), and Sheffield v. Owens-Corning Fiberglass Corp., 595 So. 2d 443 (Ala. 1992). Personal representatives of the estates of Thomas Shepherd and James L. Burnett Sr. ("plaintiffs") sued OCF in the District Court of Dallas County, Texas, in 1987 and 1988, respectively, alleging that asbestos products manufactured by OCF had caused the deaths of their descendants, former seamen. These personal representatives, on February 8, 1990, and February 24, 1989, respectively, also filed actions against the shipowners in the Mobile County, Alabama, Circuit Court. In the Alabama actions, the plaintiffs alleged, inter alia, that the ships on which the seamen worked had been unseaworthy because of asbestos fibers

aboard them. The shipowners, seeking indemnity or contribution, impleaded OCF and numerous other manufacturers of asbestos-containing products, which, they alleged, were responsible for the deaths of the plaintiffs' decedents.

Subsequently, OCF obtained agreements with the plaintiffs settling their claims against OFC and purporting to release OCF from any further liability arising out of the plaintiffs' claims. OCF then moved for summary judgments in the Mobile County Circuit Court, contending that the settlements with the plaintiffs barred the shipowners' claims against OCF for indemnity or contribution. In February 1991, the trial court entered summary judgments in favor of OCF in both cases. These judgments were subsequently certified as final judgments, pursuant to Ala. R. Civ. P. 54(b). The shipowners appealed. On July 15, 1992, this Court granted the shipowners' motions to

consolidate the appeals of the summary judgments for briefing and oral argument. On August 12, 1992, the trial court granted motions filed by the shipowners to dismiss the plaintiffs' claims against them on the basis of the actions pending in Texas. In Shepherd v. Maritime Overseas Corp., [Ms. 1911884, March 12, 1993] ___ So. 2d ___ (Ala. 1993), we reversed the judgments dismissing the plaintiffs' claims against the shipowners and remanded their causes for further proceedings.

On these appeals of the summary judgments in favor of OCF, the shipowners contend that they are entitled to recover from OCF their attorney fees or damages in the event of a damages award, under (1) an indemnity theory or (2) a rule allowing contribution from a joint tort-feasor notwithstanding that tort-feasor's settlement with, and release by, the plaintiff.

I. Indemnity

The shipowners contend that OCF's conduct in supplying asbestos-containing products for shipboard use was "actively" wrongful, while their fault consisted, they contend, only in failing to discover the danger of asbestos -- conduct that they insist was only "passively" wrongful. See Wedlock v. Gulf Mississippi Marine Corp., 554 F.2d 240, 243 (5th Cir. 1977) ("the classic case of passive negligence occurs ... when one joint tortfeasor creates a danger that the other (passive) tortfeasor merely fails to discover or to remedy"); Avondale Shipyards, Inc., v. Vessel Thomas E. Cuffe, 434 F. Supp. 920, 928 (E.D. La. 1977) ("breach [of] an absolute duty to provide a seaworthy vessel" constitutes passive fault). They contend that maritime law accords them a right to recoup their attorney fees from OCF pursuant to a theory of "active" versus "passive" fault.

Preliminarily, we note that the procedural posture of the shipowners in this case renders their claims for indemnity particularly unpersuasive. Specifically, the shipowners are nonsettling, third-party plaintiffs seeking indemnity from third-party defendant OCF, following OCF's settlement with the plaintiffs.

"The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." Restatement (Second) of Torts § 886B (1977), comment c. "The unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility, rather than to leave it on the indemnitee...." Id.

At this stage, the shipowners have satisfied no obligation. Nor has OCF, which was impleaded by the shipowners, been unjustly enriched by the shipowners' litigation. This case thus involves none of the traditional elements necessary to trigger a right to indemnity. On a more general ground, however, recent developments in maritime law render misplaced an admiralty defendant's reliance on the active-passive fault doctrine.

In 1975, the United States Supreme Court abrogated the "divided damages" rule set forth in The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1855), which required joint maritime tort-feasors to share damages equally, regardless of their relative degrees of fault. United States v. Reliable Transfer Co., 421 U.S. 397 (1975). In so doing, it established in maritime law the concept of comparative fault, that is, a "rule requiring, when possible, the

allocation of liability for damages in proportion to the relative fault of each party." Id. at 398.

After Reliable Transfer, a number of admiralty courts concluded that maritime law no longer recognized a right to indemnity based on the active-passive fault distinction. Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154 (5th Cir. 1985); Loose v. Offshore Navigation, Inc., 670 F.2d 493 (5th Cir. 1982). In this connection, Loose offered the following pertinent comments:

> "The introduction of the rule of comparative fault to maritime torts requires reconsideration of the active-passive negligence doctrine. The common law courts were at first unwilling 'to make relative value judgments of degrees of culpability among wrongdoers.' The principle that an actively

negligent tortfeasor should be required to indemnify a tortfeasor only passively negligent was developed to alleviate the harsh rule that prohibited apportionment among tortfeasors. In a sense, then, the indemnity rule was a precursor of modern systems of comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong. Comparative fault seeks the same objective both more persuasively and more accurately. A comparative fault system not only eliminates the doctrine of contributory negligence but also apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none.

"It is difficult to see the need for the active-passive indemnification rule in a comparative fault system. While the active-passive concept is more equitable than strict nonapportionment, there have never been satisfactory distinctions between the definition of 'active' and 'passive.' The district court in this case did not attempt to define these terms, but left it to the jury to define them from their everyday significance. As the district judge pointed out, however, it would have been difficult on the authority of decided cases to phrase

> a charge that would have been instructive and clear. There is, therefore, all the more reason to determine the degree of responsibility of each tortfeasor on the facts as presented at trial, and then to apportion damages among the tortfeasors on that basis. Leger [v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979),] has already extended the Reliable Transfer concept of proportionate fault to maritime personal injury cases. We reaffirm that extension and emphasize what other courts and commentators have said before us: the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party."

670 F.2d at 500-02 (footnotes omitted). See also D. Owen and J. Moore III, Comparative Negligence In Maritime Personal Injury Cases, 43 La. L. Rev. 941, 955 (1983) ("rationale of Reliable Transfer 'is strongly at odds' with that of tort indemnity"). We find this reasoning persuasive and hold that there is no right to indemnity based on a distinction

between active and passive fault in maritime actions filed in Alabama state courts.

II. Contribution

OCF's contention that its settlements with the plaintiffs extinguish the shipowners' claims for contribution presents this Court once again with the question of the effect of a settlement on a tort-feasor's liability to joint tort-feasors for contribution. The issue was presented earlier in Foster Wheeler USA Corp. v. Owens-Illinois, Inc., 595 So. 2d 439, 442-43 (Ala. 1992), another appeal spawned by the maritime asbestos litigation in progress in Mobile County. Although we ultimately deferred a decision on that question because of the brevity of the parties' treatment of the issue in relation to its potential impact on the large volume of pending cases, we stated:

> "The resolution of this issue is not without difficulty, as evidenced by the three approaches expressed in

the Restatement (Second) of Torts § 886A, comment m:

"'m. Release. There are three possible solutions for the situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim. Each has its drawbacks and no one is satisfactory.

"'[Option I]. The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation. This has been called the fairest solution, but it has proved to be very discouraging to settlements. A tortfeasor (and his insurance company) has no incentive to make an individual settlement if he is not at all sure that it will extinguish his liability and allow him to close his books on the subject. This works most decidedly to the detriment of the settling tortfeasor, and the insurance companies have been strongly opposed to it.

"'[Option II]. The money paid extinguished both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution. This solution favors the settling tortfeasor and his insurance company and is supported by them. But it can be very unfair to the other tortfeasors and provides a clear incentive to collusion between the settling parties. To avert this it may be necessary to impose a requirement of "good faith." But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated.

"'[Option III]. The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the [pro rata] equitable share of the obligation of the released tortfeasor. This solution works strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement. It may, for example, make it not desirable

> for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.
>
> "'Important policy reasons therefore weigh against each of the three solutions. Case authorities and statutes are also divided and there is no semblance of a consensus. The experience in drafting the uniform laws depicts the difficulties of the problem. The 1939 uniform act adopted the first solution; the 1955 act supplanting it adopted the second solution; and the 1977 act supplanting it adopted the third solution.
>
> "'The Institute leaves these issues to a caveat and takes no position.'
>
> (Emphasis added [in Foster Wheeler USA].)"

595 So.2d at 442-43 (quoting Restatement (Second) of Torts § 886A (1977), comment m). The shipowners urge us to adopt Option I, under which, they contend, their claims against OCF for contribution would remain viable.

At the outset of our discussion of this issue, we note that "attorney's fees and legal

costs incurred by the defending tortfeasor [are] not recoverable in contribution from the other negligent parties." ODD Bergs Tankrederi A/S v. S/T Gulfspray, 650 F.2d 652, 655 (5th Cir. 1981). However, resolution of the question regarding the effect of the pro tanto settlements is necessitated by our reversal of the judgments dismissing the plaintiffs' claims against the shipowners in Shepherd v. Maritime Overseas Corp., [Ms. 1911884, March 12, 1993] So. 2d (Ala. 1993). Moreover, because the issue is of grave consequence to the litigation pending in Mobile County, we deem it expedient at this time to set forth rules governing its disposition.

Federal courts sitting in admiralty have reached no consensus on this issue. The Fifth Circuit Court of Appeals currently allocates damages among the tort-feasors on a pro rata basis consistent with Option III, as

applied in Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979); see Teal v. Eagle Fleet, Inc., 933 F.2d 341 (5th Cir. 1991); Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430 n.11 (5th Cir. 1988) (in dicta, approving Leger's allocation method), cert. denied, 490 U.S. 1106 (1989); Vickers v. Chiles Drilling Co., 822 F.2d 535 (5th Cir. 1987); Martin v. Walk, Haydel & Assoc., Inc., 742 F.2d 246 (5th Cir. 1984); or, alternatively, reduces the plaintiff's total claim by the amount of the pro tanto settlement, consistent with Option II, see Rollins v. Cenac Towing Co., 938 F.2d 599 (5th Cir. 1991), cert denied, ___ U.S. ___, 112 S. Ct. 1242 (1992); Meyers v. Griffin-Alexander Drilling Co., 910 F.2d 1252 (5th Cir. 1990) (disapproving Leger's damages allocation procedure); Hernandez v. M/V Rajaan, 841 F.2d 582 (5th Cir.), cert denied, 488 U.S. 981 (1988); but does not permit contribution from a

settling tort-feasor as provided by Option I. Hardy v. Gulf Oil Corp., 949 F.2d 826, 834 (5th Cir. 1992). The Seventh Circuit Court of Appeals rejected Option III but declined to choose between Options I and II. In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992). The Eighth Circuit Court of Appeals has adopted Option III and criticized Option I. Associated Electric Cooperative, Inc. v Mid-America Transportation Co., 931 F.2d 1266 (8th Cir. 1991). See also Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218 (S.D.N.Y. 1991) (expressly rejecting Option I and applying a combination of Options II and III).

Although these courts have expressed considerable divergence of opinion, they were virtually unanimous in declining to apply Option I until the Eleventh Circuit refused to recognize a settlement bar to contribution in Great Lakes Dredge & Dock Co. v. Tanker Robert

Watt Miller, 957 F.2d 1575 (11th Cir.), cert. denied, ____ U.S. ____, 113 S.Ct. 484 (1992). Miller v. Christopher, 887 F.2d 902, 906 (9th Cir. 1989) (criticizing Option I and noting that no federal admiralty court had applied it). The shipowners have been able to cite no other admiralty case applying that approach. However, they urge us to follow Great Lakes Dredge on the ground, inter alia, that because Alabama lies within the geographical area encompassed by the Eleventh Circuit, failure to follow Great Lakes Dredge will lead to forum shopping. We share this concern; however, our concern over the potentiality of forum shopping is insufficient to override our reluctance to follow an approach that, in this Court's view, is inconsistent with the principles of maritime law and has no support among the rest of the federal circuits

that have addressed this issue.[1] Indeed, our reading of Great Lakes Dredge compels us to conclude that the Eleventh Circuit's rejection of Option III and its consequent adoption of Option I resulted from its misconstruction of Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), a leading authority for the application of Option III.

In Leger, the plaintiff sued his employer, Drilling Well Control, Inc. ("DWC"), Dresser Offshore Services, Inc. ("Dresser"), and

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[1]This Court is not bound by decisions of lower federal courts. Ballew v. State, 292 Ala. 460, 296 So. 2d 206 (1974), cert denied, 419 U.S. 1130 (1975); Seibold v. State, 287 Ala. 549, 253 So. 2d 302 (1970). This rule is particularly applicable where, as here, the circuits are in conflict. See Note, The State Courts and the Federal Common Law, 27 Alb. L. Rev. 82 (1963).

Continental Oil Company ("Continental") because of injuries he sustained while working on a barge owned by Dresser at the site of an offshore oil well owned by Continental. Id. Before trial, DWC and Continental settled with Leger for $82,331.05 and $100,000, respectively. Damages were awarded Leger in the amount of $284,090 and fault was allocated according to the following percentages: (1) Leger, 35%, (2) Dresser, 45%, (3) Continental, 20%, and (4) DWC, 0%. The district court entered a judgment against Dresser in the amount of $127,840, which "reflect[ed] the total damages of $284,090.00 reduced by $99,430.17 representing the 35% contributory negligence of the plaintiff and by $56,817.24 representing the 20% negligence attributed to Continental. No reduction in the judgment was made for DWC's settlement since DWC was found not to be negligent." Id. at 1248.

This procedure imposed upon Dresser, the nonsettling tort-feasor, liability for damages based solely on its pro rata share of the fault.

On appeal, Dresser contended that the trial court erred in refusing to calculate the judgment based on a pro tanto reduction of the total judgment by $182,331.05, the amount of the plaintiff's settlement with DWC and Continental. It contended, moreover, that the damages recoverable under the court's pro rata method represented a windfall to Leger. The Court of Appeals for the Fifth Circuit rejected these contentions and affirmed the judgment. It explained:

> "In accord with its ground rules, the trial court rendered judgment against Dresser for $127,840.00, representing Dresser's percentage of negligence (45%) multiplied by Leger's damages as found by the jury ($284,090.00). Although Leger nominally received $310,171.05 by virtue of the settlement and the judgment, we do not consider this a double recovery. Leger merely obtained a favorable settlement. By releasing DWC and

Continental in exchange for $182,331.05, Leger 'sold' or relinquished any claims which he had against them. See Rose v. Associated Anesthesiologists, 163 U.S. App. D.C. 246, 501 F.2d 806 (1974) (characterizing a settlement as a pro rata sale of the plaintiff's claim). At the time of the settlement negotiations, no one new how a jury would apportion fault or in what amount it would find damages. By settling with Continental and DWC, Leger took the risk that he was foregoing a larger amount possibly to be obtained at trial. Likewise, Continental and DWC must have considered the amount for which they settled to be less than their exposure at trial would have been. Dresser made a different assessment. By going to trial it took the risk that the jury would find substantial damages and a high degree of negligence on its part. With the benefit of hindsight it is clear that only Leger correctly charted his course. However, according to the rules which we adopt today, Leger could have lost a great deal. For example, if he had settled with DWC and Continental for $182,331.05 and if the jury had found $1,000,000 in total damages, but that Dresser was only 5% negligent, Leger would have been left with the $182,331.05 in settlement with DWC and Continental and $50,000 in judgment against Dresser (5% of $1,000,000). He would

> have released a claim subsequently found to be worth $950,000 in exchange for $182,331.05. He could not then complain that he made a poor settlement and that he should receive more based on the jury's assessment of his total damages at $1,000,000. Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault."

Leger, 592 F.2d at 1250 (footnotes omitted).

As pointed out above, only one of the two nonsettling tort-feasors, Dresser, had been found negligent. Because of the procedural posture of the parties as the result of this finding, Leger focused primarily on only one issue necessarily implicated by Option III, that is, the method of allocating damages among the nonsettling tort-feasors. Thus, the court was not squarely confronted with two other issues inherent in the application of that procedure -- the question of joint liability among the nonsettling tort-feasors and the issue presented in this case, that is, the efficacy of a

settlement as a bar to a nonsettling tort-feasor's right of contribution. As a corollary, however, the reduction of the plaintiff's claim by the amount of the settling tort-feasor's pro rata share of fault obviated the necessity of contribution from a settling tort-feasor -- none of the nonsettling tort-feasors could be charged any amount representing the settling tort-feasor's share of the fault. T. Schoenbaum, Admiralty and Maritime Law § 4-15, at 26 (Supp. 1992). The following remarks from Leger are also relevant in this connection:

> "The encouragement of settlements is the final factor which must be considered in this case. Whether the plaintiff or any of the defendants are ultimately found to have made a favorable settlement, we will 'respect the aleatory nature of the settlement process ....' Doyle v. United States, 441 F. Supp. 701, 711 n. (D.S.C. 1977). If Dresser were allowed to reduce Leger's recovery against it by the dollar value of Leger's settlement, Dresser

> would be left to pay a small portion ($284,090.00 total damages minus $182,331.05 settlement minus $99,400 for plaintiff's contributory negligence equals $2,358.95) of the total damages even though its negligence was the main contributing factor in causing them. Thus, Dresser would benefit substantially from its intransigence or miscalculation in refusing to settle the case. We refuse to adopt an approach which would reward a defendant for refusing to settle. If a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from its decision."

Id. at 1250-51.

The presence in Leger of only one negligent nonsettling tort-feasor also occasioned Leger's most conspicuous unanswered question, that is, whether liability among remaining nonsettling tort-feasors remained joint. That Leger could be read as adopting a modified form of joint liability apparently caused some courts to reject that approach -- most significantly, the Eleventh Circuit, which in a trilogy of decisions rejected the Leger

approach and applied Option I.[2]

The litigation precipitating the Eleventh Circuit's application of Option I involved three successive appeals, beginning with Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 718 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); including Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1544 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); and culminating in Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575 (11th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 484 (1992). The litigation arose out of a collision on the St. Johns River

[2]A panel decision in the Court of Appeals for the First Circuit also appears to have concluded that Leger modified traditional principles of joint and several liability. Joia v. Jo-Ja Service Corp., 817 F.2d 908 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988).

between a dredge owned by Great Lakes Dredge & Dock Company ("Great Lakes") and a tanker owned by Chevron Transport Corporation ("Chevron"). The plaintiffs, having settled their claims against Chevron, sued Great Lakes, their Jones Act employer. The third-party claims of Great Lakes against Chevron for contribution were severed; thus, Chevron was not a defendant in the initial trial.

At trial, the jury, pursuant to special interrogatories on which it was to determine the relative percentages of fault of all entities involved in the accident, attributed 100% of the fault to Chevron, a nonparty. Consequently, it assessed no damages.

The issue in Ebanks, the first appeal, concerned only the proper method of apportioning

fault.[3] Great Lakes contended that the method of allocation was consistent with, and required by, Leger. The court distinguished Leger on the ground that Chevron, unlike the settling defendants in Leger, had never been subject to the plaintiffs' claims. Ebanks, 688 F.2d at 720. More significantly, however, the court concluded that Leger's "effect as precedent [had] been weakened" by Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), Ebanks, 688 F.2d at 720, which involved the proper

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[3]Preliminarily, the court acknowledged that it was bound by Leger pursuant to Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), in which an en banc Court of Appeals for the Eleventh Circuit formally adopted the case law of the Fifth Circuit, from which the Eleventh Circuit was formed by the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995.

construction of an amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905.

The amendment at issue in Edmonds prevented a negligent shipowner from recouping from a longshoreman's employer, whose negligence concurred with that of the shipowner to injure the longshoreman, any damages for which the shipowner might be liable. The United States Supreme Court held that the amendment did not abrogate the rule of joint liability long recognized in maritime torts in favor of a proportionate fault rule.[4] 443 U.S. at 263-64. Edmonds thus reaffirmed the rule allowing a maritime plaintiff "to sue in a common-law action all the wrong-doers, or any one of them, at his election," and, absent

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[4]The Court of Appeals for the Fourth Circuit had construed the statute as limiting the liability of the shipowner to its pro rata percentage of fault.

contributory negligence, to obtain a "judgment in either case for the full amount of his loss." Id. at 260 n.7 (quoting The Atlas, 93 U.S. 302, 315 (1876)).

Ebanks concluded that because maritime law, as reaffirmed by Edmonds, provided for recovery "against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the [jury's] attention by requiring it to allocate the degree of fault between the defendant and a non-party." 688 F.2d at 722. Implicit throughout the court's analysis of the allocation issue was its view that the Leger approach involved a modified form of joint liability and was, consequently, inconsistent with traditional principles of maritime law. This view of Leger was even more prominent in Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1544 (11th Cir. 1987), cert. denied, 486

U.S. 1033 (1988), on appeal following return to remand.

After remand by Ebanks, Great Lakes settled with all the plaintiffs except Vivian Self, the widow of a former seaman employed by Great Lakes. In the second trial of that case, the trial judge (1) apportioned the fault of Chevron and Great Lakes vis-à-vis each other but reserved to a subsequent trial an adjudication of their damages, (2) determined the liability of Great Lakes to Self, (3) and awarded damages to Self. Self explained the findings of the trial court as follows:

> "The court found that Self's total damages amounted to $661,354.00 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron [for $315,000], and because the trial court was of the view that this court's opinion in Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), required an apportionment of damages, the court awarded Self a judgment of $198,406.20 against

> Great Lakes, which represents 30% of Self's total damages."

Self, 832 F.2d at 1544-45.

A panel of the Eleventh Circuit reversed that portion of the judgment awarding damages on the basis of Great Lakes' pro rata share of fault. It held that the plaintiff's damages from the nonsettling tort-feasor should be calculated on a pro tanto basis, that is, a reduction by the amount of her settlement with Chevron, the settling tort-feasor. Id. at 1548.

Focusing once again on the perceived tension between Leger and Edmonds, the court construed Leger as standing for the proposition that "it is the plaintiff who bears the loss or obtains the gain." Self, at 1546 (emphasis added). Concluding that such a rule was inconsistent with Edmonds, which, according to Self, required the maritime defendant to bear "any inequity which results from the implementation of a seaman's damage award," id.,

the court went further than it had in Ebanks, declaring, in effect, that Leger could not "withstand the more recent Edmonds opinion." Self, at 1546 (citing Joia v. Jo-Ja Service Corp., 817 F.2d 908 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988), and Drake Towing Co. v. Meisner Marine Const. Co., 765 F.2d 1060 (11th Cir. 1985)).

After Self, Great Lakes settled with Self's estate for $2,050,000 and, contending that it had paid more than its equitable share of the damages, subsequently sought contribution from Chevron. Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575 (11th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 484 (1992). Thus, for the first time in that litigation, the Eleventh Circuit was directly confronted with the issue presented in this case, that is, the preclusive effect to be accorded a settlement and release.

In Great Lakes Dredge, the third and latest appeal in that litigation, the court framed the issue as "[w]hether, given the pro tanto method adopted in Self, a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor." Id. at 1580. That the Great Lakes Dredge court was not writing on a clean slate is obvious from the terms in which the court framed the issue. Indeed, the court expressly concluded that Self had "overruled Leger and rejected the proportionate distribution of liability." 957 F.2d at 1581.

Considering itself bound by stare decisis, id. at 1580 n.4, to reject one of the two options that bars contribution from a settling tort-feasor, the court next compared the relative advantages and disadvantages of

Options I and II. Observing that a nonsettling tort-feasor could, under the pro tanto approach adopted in Self, "be forced to pay for more than [its] proportionate share of damages," the court concluded that on balance, an equitable distribution of damages among nonsettling tort-feasors through the right of contribution outweighed the policies favoring settlements. 957 F.2d at 1581.

We might be inclined to agree with the approach thus adopted by the Eleventh Circuit if its analysis of Leger and, therefore, Option IIIwere sound. We conclude, however, that the opposite is true. The court's analysis proceeded upon the premise that Option III as applied in Leger abrogated or modified joint liability among nonsettling tort-feasors. Such an approach would relieve nonsettling tort-feasors not only of the liability represented by the pro rata share of settling tort-feasors, but also of liability represented

by the pro rata shares of the nonsettling tort-feasors, thus requiring the plaintiff to bear the risk, for example, of a nonsettling tort-feasor's insolvency. Such an approach would, indeed, contravene the policy of maritime law, which has traditionally provided "special protection" for injured seamen. Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1548 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); Joia v. Jo-Ja Service Corp., 817 F.2d 908, 917 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988); see also Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949).

Nothing in the text of the Restatement, however, or, for that matter, Leger, requires this result.[5] Significantly, the Fifth

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[5]As we noted above, the issue of joint liability among nonsettling tort-feasors did not arise in Leger because that case involved only one nonsettling tort-feasor.

Circuit has recently declared expressly that Leger did not "eliminate the well established maritime rule of joint liability." Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430 n.11 (5th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Option III, therefore, does not prevent a maritime plaintiff from recovering all his damages -- minus an amount represented by the settling tort-feasor's percentage of fault -- from any of the nonsettling tort-feasors. As among those tort-feasors, contribution provides the vehicle through which an equitable distribution of damages may be achieved. See Miller v. Christopher, 887 F.2d 902, 904 (9th Cir. 1988). The tort-feasors, rather than the plaintiff, thus bear the risk of a joint tort-feasor's insolvency.

Because this Court's understanding of Option III and Leger differs fundamentally from the construction offered by the Eleventh

Circuit, we see no tension between Option III and maritime law such as was expressed in the Ebanks-Self-Great Lakes trilogy. On the contrary, this approach appears to represent the most efficient method of accommodating the policies of federal and maritime law. As discussed above, the reduction in a plaintiff's claim by the pro rata method of Option III is as likely to inure to the plaintiff's benefit as a pro tanto reduction, which obtains pursuant to Options I and II, and it does not seem unreasonable to require the plaintiff to forgo that portion of his claim represented by the pro rata fault of the tort-feasor with which he voluntarily settled. A pro rata reduction in the plaintiff's total claim also prevents unfairness to the nonsettling tort-feasors that can occur under Option II's pro tanto reduction, which "allows the plaintiff, in effect, to 'repudiate' his bargain since he can be made

whole out of the pockets of the non-settling tortfeasors." T. Schoenbaum, Admiralty and Maritime Law § 4-15, at 26 (Supp. 1992). Indeed, allocation of damages based on the settling tort-feasor's pro rata share of fault obviates the need for contribution to nonsettling tort-feasors. Id.

The application of Option III, which, unlike Option I, recognizes the finality of a settlement, also accommodates the policy of the federal courts favoring settlements. See Fed. R. Civ. P. 68; Marek v. Chesny, 473 U.S. 1, 12-13 (1985) (Powell, J., concurring); Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); see also Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218, 222 (S.D.N.Y. 1991).

Moreover, allowing contribution from settling tort-feasors could subject plaintiffs

to liability for damages and expenses recovered by nonsettling defendants from settling defendants. For example, the settlement agreements involved in this case contained the following provision:

> "In consideration for the payment of the aforesaid sum, the Plaintiffs ... agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim asserted by any person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the Plaintiffs or their representatives, heirs or assigns, arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to Plaintiffs."

(Emphasis added.) Based on this indemnity provision, OCF has stated its intention to pursue its rights and remedies against the plaintiffs in the event the shipowners' claims against it are successful.

These considerations compel us to conclude that Option III affords the appropriate method for the disposition of maritime cases filed in Alabama state courts. The shipowners are, therefore, precluded by OCF's settlements from seeking contribution from OCF for attorney fees or damages.

The shipowners further contend that even under Option III a settling defendant must remain in the suit to litigate the issue of its own percentage of fault. They suggest that the alternative, that is, requiring the plaintiff to minimize at trial the settling tort-feasor's percentage of fault is unworkable and unfair to the plaintiff. Thus, they contend that the trial court erred in granting OCF's motions for summary judgment.

We agree that Option III requires the trier of fact to determine the percentage of the settler's fault. Stanley v. Bertram-Trojan,

Inc., 781 F. Supp. 218, 222 (S.D.N.Y. 1991); Bordelon v. Consolidated Georex Geophysics, 628 F. Supp. 810, 812-13 (W.D.La. 1986); see also M. Yeates, P. Dye, Jr., and R. Garcia, Contribution and Indemnity in Maritime Litigation, 30 S. Tex. L. Rev. 215, 246-47 (1989). However, we do not agree that requiring the plaintiff to exculpate the settling tort-feasor at trial is unworkable or necessarily inures to the plaintiff's detriment. On the contrary, requiring an alleged tort-feasor to remain in the suit after reaching a settlement with the plaintiff would virtually nullify the utility of the rule recognizing a settlement bar to contribution -- one of the principal advantages of Option III. Just as "a tortfeasor has no incentive to enter an individual settlement if it will remain vulnerable to suit based on plaintiff's claim," Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218, 222 (S.D.N.Y. 1991), it would seem to have

little more incentive to settle if it were required to remain in the suit, thus incurring further litigation expense. Bordelon v. Consolidated Georex Geophysics, 628 F. Supp 810, 812-13 (W.D. La. 1986). Moreover, an alleged tort-feasor constrained to litigate the issue of its own fault after a settlement and release would have little incentive to mount a compelling defense of a position for which it could not incur further liability regardless of the outcome of the suit. Bordelon, 628 F. Supp. at 812-13 (W.D. La. 1986). Indeed, it is not unreasonable to suppose that a jury seeking to determine the percentage of fault attributable to a settling tort-feasor would find more persuasive the plaintiff's vigorous efforts at exculpating the alleged tort-feasor, bolstered, no doubt, by evidence gleaned through the tort-feasor's cooperation incident to dismissal from the suit, than the grudging defense of an unwilling litigant.

In sum, the shipowners have failed to demonstrate in what respects this procedure is unworkable, and we disagree with their contentions that it is unfair. We conclude, therefore, that the summary judgments in favor of OCF were proper; those judgments are affirmed.

1911251 - AFFIRMED.

1911252 - AFFIRMED.

Hornsby, C. J., and Maddox, Almon, Shores, Houston, and Steagall, JJ., concur.

EXHIBIT B

SUMMARY JUDGMENT ORDER DATED FEBRUARY 11, 1991

AND

SUMMARY JUDGMENT ORDER DATED FEBRUARY 27, 1991

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JAMES L. BURNETT, SR., et al.,	)	
Plaintiffs,	)	
v.	)	
KEYSTONE SHIPPING COMPANY, et al.,	)	CIVIL ACTION NO. CV-89-000643
Defendants,	)	
and	)	
AMERADA HESS CORP. LYKES BROS. STEAMSHIP CORP., UNITED BRANDS COMPANY,	)	
Third Party Plaintiffs,	)	
v.	)	
A.C. and S., et al.	)	
Third Party Defendants.	)	

O R D E R

This matter having come on for consideration of the motion filed by Third-Party Defendant, Owens-Corning Fiberglas Corporation,

for Summary Judgment as to all pending third-party claims or cross-claims filed against it, and the Court, having considered the Motion for Summary Judgment and the attached release signed by the Plaintiff, all other pleadings and the arguments of counsel adduced herein, is of the opinion that Summary Judgment should be granted to the Third-Party Defendant, Owens-Corning Fiberglas Corporation, dismissing all third-party claims and cross-claims with prejudice, as they pertain to Owens-Corning Fiberglas Corporation.

Now, therefore, it is ORDERED, ADJUDGED and DECREED that summary judgment be and it hereby is GRANTED to Third-Party Defendant, Owens-Corning Fiberglas Corporation, as to all third-party claims and cross-claims pending in the above-referenced matter.

DONE AND DATED this 11th day of February, 1991.

(signed) Edward B. McDermott
EDWARD B. McDERMOTT
Circuit Judge

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BESSIE SHEPHERD, Administratrix of the Estate of Thomas P. Shepherd, deceased, and BESSIE SHEPHERD, individually,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV-90-0449
LYKES BROS. SS CO., et al.	)	
Defendants,	)	
and	)	
CHAS. KURTZ & CO., INC., et al.	)	
Third-Party Plaintiffs,	)	
v.	)	
A.C. and S., INC., et al.	)	
Third Party Defendants.	)	

O R D E R

This matter having come on for consideration of the motion filed by Third-Party

Defendant, Owens-Corning Fiberglas Corporation, for Summary Judgment as to all pending third-party claims or cross-claims filed against it, and the Court, having considered the Motion for Summary Judgment and the attached release signed by the Plaintiff, all other pleadings and the arguments of counsel adduced herein, is of the opinion that Summary Judgment should be granted to the Third-Party Defendant, Owens-Corning Fiberglas Corporation, dismissing all third-party claims and cross-claims with prejudice, as they pertain to Owens-Corning Fiberglas Corporation.

Now, therefore, it is ORDERED, ADJUDGED and DECREED that summary judgment be and it hereby is GRANTED to Third-Party Defendant, Owens-Corning Fiberglas Corporation, as to all third-party claims and cross-claims pending in the above-referenced matter.

DONE AND DATED this 27th day of February, 1991.

(signed) Robert G. Kendall
ROBERT G. KENDALL
Circuit Judge

EXHIBIT C

Restatement (Second) of Torts
§ 886A, comment m

Restatement (Second) of Torts § 886A, comment m:

m. Release. There are three possible solutions for the situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim. Each has its drawbacks and no one is satisfactory.

[Option I]. The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation. This has been called the fairest solution, but it has proved to be very discouraging to settlements. A tortfeasor (and his insurance company) has no incentive to make an individual settlement if he is not at all sure that it will extinguish his liability and allow him to close his books on the subject. This works most decidedly to the detriment of the settling tortfeasor, and the insurance companies have been strongly opposed to it.

[Option II]. The money paid extinguished both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution. This

solution favors the settling tortfeasor and his insurance company and is supported by them. But it can be very unfair to the other tortfeasors and provides a clear incentive to collusion between the settling parties. To avert this it may be necessary to impose a requirement of "good faith." But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated.

[Option III]. The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor. This solution works most strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement. It may, for example, make it not desirable for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.

Important policy reasons therefore weigh against each of the three solutions. Case authorities and statutes are also divided and there is no semblance of a consensus. The experience in drafting the uniform laws depicts the difficulties of

the problem. The 1939 uniform act adopted the first solution; the 1955 act supplanting it adopted the second solution; and the 1977 act supplanting it adopted the third solution.

The Institute leaves these issues to a caveat and takes no position.

EXHIBIT D

Supremacy Clause

United States Constitution,
Article VI, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

EXHIBIT E

Sections 1257 and 1333 of
Title 28, United States Code

28 U.S.C. 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

. . .

28 U.S.C. 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.